IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 153 of 1985

WITH

COMPANY PETITION No. 154 of 1985
COMPANY PETITION No. 155 of 1985
COMPANY PETITION No. 156 of 1985

WITH

COMPANY APPLICATION No.233 of 1985
COMPANY APPLICATION No.234 of 1985
COMPANY APPLICATION No.235 of 1985
COMPANY APPLICATION No.236 of 1985
COMPANY APPLICATION No. 05 of 1986
COMPANY APPLICATION No. 58 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

SAMAR MAN-MADE FIBERS PVT.LTD. - Petitioner(s)
Versus
ALAUKIK TRADING & INVESTMENT PVT. LTD. - Respondent(s)

==========

Appearance :
MR ZUBIN F BHARDA for Petitioner No(s).: 1.
MR PC KAVINA for Respondent No(s).: 1.

==========

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date : 10/08/2005

COMMON ORAL JUDGMENT

1. Since all these matters are inter-connected and since common pleadings and common arguments are made by the parties, they are being disposed of by this common judgment.

2. Company Petition No. 153 of 1985 is filed by Samar Man-Made Fibres Private Limited under Section 433 & 434 of the Companies Act, 1956 for winding up of the respondent Company on the ground that the respondent Company has failed and neglected to pay the dues of the petitioner amounting to Rs.30,28,422.79 being the aggregate sum of the principle amount of Rs.25,87,729/-

and interest calculated thereon @ 21% p.a. upto the date of the petition.

3. Similar petitions were filed by Gaekwad Agencies Pvt. Ltd. being Company Petition No. 154 of 1985, Pratap Investment Private Limited being Company Petition No. 155 of 1985 and Anjana Dealers Private Limited being Company Petition No. 156 of 1985 against the very same respondent Company, namely, Alaukik Trading & Investment Private Limited.

4. The petitioners of all the four petitions have also filed Company Application Nos. 233 to 236 of 1985 praying for appointment of the Official Liquidator or some other fit and proper person as Provisional Liquidator of the respondent Company and further praying for an injunction against the respondent Company from dealing with, disposing of, alienating or in any manner encumbering any of the immovable properties held by or standing in the name of the respondent

Company.

5. Company Application No. 5 of 1986 is filed by the petitioner in Company Petition No. 153 of 1985 seeking direction to the Official Liquidator or some other Officer of this Court and authorising him to take charge and custody of the Books of Accounts and Records etc. of the respondent Company described in Exh. G to the affidavit of Shri S.K. Thakker dated 11.01.1986 filed in support of the Judge's Summons in the said Company Application.

6. Company Application No. 58 of 1986 is filed by the respondent Company against Shri S.K. Thakker and Shri G.K. Thakker, the key persons of all the four petitioner Companies and also against all the four petitioner Companies seeking directions to the said Shri S.K. Thakker and Shri G.K. Thakker to produce the Books of Accounts and other Records, papers, files, vouchers, the common seal of the respondent

Company and other documents and particulars etc. belonging to the Company lying in their possession.

7. Since Company Petition No. 153 of 1985 is first in point of time in number and all pleadings and arguments are made by the respective parties in this petition, the facts are taken from this petition.

8. It is the case of the petitioner that late Shri Fatesinghrao Pratapsinhrao Gaekwad, the erstwhile Maharaja of Baroda was the owner of several properties and at his instance, the respondent Company was got incorporated on 11.01.1971. Even at his instance, the petitioner Company was also got incorporated on 22.01.1971. By a declaration dated 31.01.1972, the said Shri Gaekwad has converted his properties in stock in trade of his business styled as Gaekwad Real Estate Traders, a Partnership Firm and he admitted the respondent

Company and one Mr. P.C. Hathi, in his capacity as Trustee of Gaekwad Foundation, as partners of the said Partnership Firm. The said property accordingly became the assets of the said Partnership Firm of Gaekwad Real Estate Traders. Subsequently, under a Deed of Retirement dated 05.10.1974, the said Shri Gaekwad retired from the said firm. Shri P.C. Hathi also resigned as a Trustee of Gaekwad Foundation and ceased to be a partner in the said firm of Gaekwad Real Estate Traders, and in his place, one Shri P.U. Rana, a Trustee of Gaekwad Foundation was admitted as a partner in the said Firm. Ultimately, on or about 01.04.1978, the said P.U. Rana retired from the said firm of Gaekwad Real Estate Traders, which became the sole proprietary concern of the respondent Company. It is the say of the petitioner that all the shareholders of the Company have been and are nominees and/or benamidars of the said Shri Gaekwad. It is also their say that the shareholders of the petitioner were initially

nominees and/or benamidars of the said Shri Gaekwad.

9. It is the further say of the petitioner that in respect of the properties which were converted by said Shri Gaekwad into stock in trade, a sum of Rs.1,25,00,000/- was lying to the Credit of the said Gaekwad with the said Firm which subsequently became the sole proprietary concern of the respondent Company.

10. By a Deed of Gift dated 30.03.1973, the said Shri Gaekwad made an onerous gift to the petitioner of a sum of Rs.30,00,000/- out of the said sum of Rs.1,25,00,000/- lying to his credit with the said firm. In consideration of the said gift, the petitioner, inter alia, covenanted to pay certain amounts to Sir Sayajirao Gaekwad Charities, a Public Charitable Trust set up by the said Shri Gaekwad, regularly for a period of 55 years as set out in the said Deed of Gift. Pursuant thereto, the said sum of

Rs.30,00,000/-, out of the said sum of Rs.1,25,00,000/- lying to the Credit of the said Gaekwad was transferred to the credit of the petitioner Company in the Books of the said Partnership Firm in which the respondent Company was also a Partner. Simultaneously, with the said Deed of Gift, similar onerous gifts were made by the said Shri Gaekwad of different amounts out of the balance amount lying to his Credit with the said Partnership Firm to certain other associated companies, who are the petitioners in other three petitions, where under the said other associated Companies covenanted to pay certain amounts to certain Public Charitable Trusts set up by the said Shri Gaekwad, regularly for a period of 55 years as set out in the concerned Deeds of Gift.

11. After dissolution of the firm of Gaekwad Real Estate Traders, all its assets and liabilities including the Firm name was taken over by the Company as sole proprietor thereof. Prior to

the dissolution, the said Firm had paid to the petitioner an aggregate sum of Rs.56,000/- only towards the said gift of Rs.30,00,000/-. Hence, from 01.04.1978, the entire liability to pay the balance of Rs.30,00,000/- gifted by the said Gaekwad from his credit balance with the said firm became the liability of the respondent Company. The petitioner and other associated Companies have, therefore, been shown as Creditors of the Company in the Audited Balance-sheets for the period commencing from 01.04.1978 onwards. It is alleged by the petitioner that some of the properties were sold by the Company and out of the sale proceeds, only a small amount of Rs.3,56,271/- was paid by the respondent Company to the petitioner in part payment and towards the said Gift of Rs.30,00,000/- and similar small amounts were paid by the respondent Company to the other associated Companies in part payment and towards their respective gifts whereas substantial portion of the sale proceeds of such properties

was taken away by the said Gaekwad personally. Since the payments were not made by the respondent Company to the petitioner and other associated Companies, they could not discharge their obligation to make payments to the said Public Charitable Trusts. The disputes and differences were started amongst the said Shri Gaekwad and his family members on the one hand and Shri S.K. Thakker and G.K. Thakker on the other hand and as a result thereof, the petitioner issued a notice on 04.01.1985 to the respondent Company, inter alia, demanding the payment of the balance sum of Rs.25,87,729/- due and payable by the Company to the petitioner. The said Shri S.K. Thakker thereafter resigned as Director of the respondent Company with effect from 10.01.1985. It is also alleged in the petition that in the Balance-sheet of the Company for the period commencing from 01.04.1978 and also in all subsequent audited and signed Balance Sheets of the Company for each year and lastly, the Balance-sheet of the

Company as on 31.03.1983, a sum of Rs.25,87,729/- was acknowledged as due and payable by the Company to the petitioner.

12. Despite receipt of the statutory notice, no payment has been made by the respondent Company and hence, the present petition is filed by the petitioner in October, 1985 through their advocate Shri G.N. Shah.

13. On notice being issued by this Court and on service being effected on the respondent Company, an appearance was filed and affidavit-in-reply was filed on 24.01.1986. The respondent Company has raised several objections against the maintainability of the winding up petition. It is contended that the amounts claimed as due and payable from the respondent Company is not 'debt' within the meaning of the Companies Act, 1956 as the same cannot be considered as actionable right or an enforceable claim. It is also contended that the amount

claimed by the petitioner Company is merely on account of the amount transferred in favour of the petitioner Company, merely by way of an accounting entry and does not represent any amount claimed by the petitioner in terms of any actual or factual transaction, such as dues in respect of goods sold and supplied and/or any amount due and payable under a current, mutual and open account etc. It is also contended that the amount mentioned in the petition is not the correct amount in as much as the petitioner has not given a set-off nor an adjustment in respect of the amount claimed by the respondent Company against the petitioner. Both the petitioner as well as the respondent Company were under the common and effective management of Shri S.K. Thakker and Shri G.K. Thakker at relevant times and these two persons during the relevant period of their management of the respondent Company have committed various conscious and pre-planned acts of mismanagement for personal reasons and for ulterior motives, merely with a view to

ventilate their grievances against Shri Fatesinghrao Gaekwad and although the petitioner Company claimed that the debt was due and payable in or about the year 1978, the management of the petitioner Company did not take any legal proceedings until the present petition in the year 1985 was filed. A contention was also raised about the sound financial position of the respondent Company. Certain allegations were also made against Shri S.K. Thakker and Shri G.K. Thakker in respect of the modus operendi adopted by them when they were in charge of the affairs of the respondent Company.

14. A detailed affidavit-in-rejoinder was filed on behalf of the petitioner Company on 04.04.1986 wherein it is emphatically stated that all the allegations, claims and contentions made in the reply are false, untenable, imaginary and contrary to the provisions of law and liable to be rejected. It is contended that there is no

dispute much less bonafide dispute as to the amount due and payable to the petitioner Company. Since the payment has not been made despite the service of the statutory notice, the respondent Company was commercially insolvent and unable to pay its debts and liabilities which arose in the ordinary course of business and consequently liable to be wound up. It is further contended that even the Company's own admission that the respondent Company is in financial difficulties only on account of lack of liquidity, the respondent Company is liable to be wound up as this admission would amount to commercially insolvency. It is further contended that the respondent Company has no cash funds immediately available for payment to the petitioner which would warrant winding up. Though Shri S.K. Thakker was the Chairman of the respondent Company, the real executive powers were vested in the said Shri Gaekwad. It is also contended that the said Shri S.K. Thakker has not kept the custody of the books of

accounts of the Company. On the contrary, Company Application No. 5 of 1986 was filed before this Court seeking direction to the Official Liquidator to take charge of the books of accounts as neither the said Shri Gaekwad nor any other Director have come forward to take charge of the Books of Accounts and other statutory records of the respondent Company. It was, therefore, contended that the winding up petition was required to be admitted and after public advertisement, necessary order for winding up was required to be passed.

15. On behalf of the respondent Company, additional affidavit in opposition was filed on 11.04.1986 and several legal issues were raised.

16. On behalf of the respondent, further affidavit was filed on 17.06.1998 for the limited purpose of placing on record certain relevant facts, which were occurred subsequent to the filing of the present petition and according to the

petitioner, it was absolutely relevant and has a great bearing for the purpose of proper appreciation of the present dispute. It is stated in the additional affidavit that during the pendency of the present petition before this Court, Special Civil Suits have been filed in the Court of Civil Judge (S.D.) at Baroda by Sir Sayajirao Gaekwad Charities, a Public Charitable Trust, restraining the respondent Company from making any payment to the petitioner. By an order dated 26.09.1995 passed by the Division Bench of this Court in Civil Application No. 42 of 1995 in O.J. Appeal No. 6/1995 in Company Petition No. 151 of 1991, the respondent Company was restrained from raising its share capital and was further restrained from undertaking any sale or purchase of fixed assets/investments without placing the agenda to that effect before the Board of Directors and without holding the meeting presided over by an independent Chairman Mr. Justice C.T. Dighe. By an order dated 10.06.1997 passed by the Company Law Board in

C.P. No. 32/96 and C.A. No. 173/96, the respondent Company was directed not to sell, transfer or alienate any of the properties of the Company without placing such proposal before the Board of Directors through an agenda item and without obtaining sanction of the independent Chairman appointed by this Court. It is stated that by an order dated 01.10.1996 passed by the Company Law Board, New Delhi, all the Accounting documents, account books and other relevant records of the Company have been ordered to be sealed in a cup-board. The respondent Company has placed all these orders along with this additional affidavit on record of this Court.

17. Based on the aforesaid pleadings and after hearing the learned advocates appearing for the respective parties, this Court has passed an order on 17.06.1998 wherein it is observed that while the matter was being heard for admission during the course of hearing for admission, it

was put to learned Counsel for the Company that when its liability was not disputed and the solvency of the Company was asserted, what was the hitch in discharging this liability within reasonable time ? After seeking instructions, it was informed by learned Counsel for the Company by way of further affidavit that beneficiaries to whom the amount claimed by the petitioners was ultimately to reach have filed Civil Suits for recovery of the said sum by impleading petitioner as well as respondent Company as parties thereto and decision in that regard that if the Company was accepting the liability, whether it was willing to discharge the same to the petitioners or to those who are the ultimate beneficiaries could be taken by the Board in a duly convened meeting for that purpose as for discharge of the alleged debt, the Company might have to sell or mortgage the fixed assets/investments for the purpose of raising funds, through a properly convened board meeting. The time was therefore sought for to

enable the Company to convene the Board meeting to take a decision thereof and inform the Court about the same. The Court has also directed the respondent Company to take necessary steps to convene the Board Meeting by putting the question of discharging liability referred to in all these petitions in its agenda.

18. Subsequent to the aforesaid order, one more affidavit was filed on behalf of the respondent Company on 03.08.1998 wherein it is stated that the independent Chairman Mr. Justice C.T. Dighe, Former Judge, Bombay High Court, has undergone a bye-pass surgery about two weeks before the date of the said affidavit and hence, meeting could not be convened.

19. The matter was rested there for quite sometime and it is only when it was listed before this Court on 01.07.2003, the petition was admitted and notice of admission was ordered to be published in Indian Express & Sandesh – both

Baroda edition within six weeks from the date of the said order. Pursuant to this order, advertisements were published and affidavit of publication was filed on 16.10.2003.

20. Against this order of admission and advertisement, the respondent Company has preferred O.J. Appeal No. 170 of 2003 before the Division Bench of this Court and the said Appeal is still pending for decision. During the pendency of the O.J. Appeal before the Division Bench, all these matters are listed on several occasions. However, the appeals were not ripe for hearing and hence, at the joint request, these petitions and applications are taken up for final hearing. All these petitions as well as applications are of the year 1985 and 1986. When they have reached to the stage of final hearing, advocates of both sides are changed.

21. Mr. Zubin F. Bharda, learned advocate appears for the petitioner and Mr. P.C. Kavina, learned

advocate appears for the respondent Company.

22. Mr. Bharda has submitted that there is no dispute about the fact that the amount as claimed in the petition is due and payable. There is also no dispute about the fact that the respondent Company has failed and neglected to pay the said amount to the petitioner. From the reply filed by the respondent Company, it becomes obvious and there is clear cut admission that the amount is due and payable by the respondent Company. Only technical objections were raised which have no substance. Despite these objections, earlier this Court has directed the respondent Company to convene Board Meeting and take the decision with regard to discharge of the liabilities by making payment either to the petitioners or to the ultimate beneficiaries and since it has not been done, this Court has admitted the petition and passed the order of advertisement. Mr. Bharda has further submitted that there is no substance in

the issue raised by the respondent Company with regard to the limitation. Neither the petition nor the debt of the petitioner is barred by limitation. In support of his submission, he relied on the decision of Punjab & Haryana High Court in the case of **Lahore Enamelling And Stamping Co. Ltd. V/s. A.K. Bhalla and Others, [1958] 28 Company Cases 216** wherein it is held that entries in the balance-sheet of a Company as regards amounts due to Creditor constitute an acknowledgment of debts due to them within the meaning of Section 19 of the Indian Limitation Act.

23. Mr. Bharda has further relied on the decision of this Court in the case of **Ambica Mills Ltd., Ahmedabad V/s. Commissioner of Income-tax Gujarat, Ahmedabad, A.I.R. 1964 Gujarat 208** wherein Company acknowledging in its Balance-sheets unpaid wages every year was sought to be brought to taxes under Section 10(2A) of the Income Tax Act on the ground that the

liabilities having been time barred were extinguished, this Court has held that the liability of the assessee Company to pay the unpaid and unclaimed wages could not be said to be barred by limitation on account of the yearly acknowledgments thereof in the balance-sheets and obviously, therefore, these amounts could not be said to have been fictionally stamped with the character of profits and gains as all along they retained the character of liabilities owing to the annual acknowledgments made by the assessee company. These acknowledgments were not in respect of time barred debts and would not, therefore, require a fresh promise to pay under Section 25(3) of the Contract Act. The unclaimed wages could not, therefore, be added back under S. 10(2A).

24. Mr. Bharda has further relied on the decision of the Karnataka High Court in the case of **State Bank of India V/s. Hedge & Golay Ltd., [1987] 62 Company Cases 239** wherein acknowledgment of a

debt in the Balance-sheet constituted acknowledgment in writing within the meaning of section 18 of the Limitation Act, 1963 and, therefore, the petition, presented on 11.04.1980 to enforce a liability of the Company acknowledged in the balance-sheet for the year ending on 30.06.1979 was indisputably held to have been filed within time. Mr. Bharda has, therefore, submitted that since the respondent Company has acknowledged in its Balance-sheet for the year ended on 31.03.1983 under the head “current liabilities and provisions” an amount of Rs.25,87,729/- due and payable to the petitioner, it is an acknowledgment in writing and it will bring the petition within the period of limitation. Mr. Bharda has also placed on record the Balance-sheet of the respondent Company for the year ended on 31.03.1979 wherein also the respondent Company has acknowledged its liabilities. Thus, there is no substance in the plea that the subsequent acknowledgment of time barred debt is no acknowledgment and, therefore,

promise to pay under Section 25(3) of the Limitation Act is required.

25. Mr. Bharda has further relied on the decision of the Hon'ble Supreme Court in the case of **Syndicate Bank V/s. R. Veeranna and others, [2003] 2 Supreme Court Cases 15** wherein it is held that unqualified acknowledgment of liability by a party not only saves the period of limitation but also gives a cause of action to the plaintiff to base its claim.

26. Mr. P.C. Kavina, learned advocate appearing for the respondent Company has mainly addressed the Court on the preliminary objections to the maintainability of the petition. The first preliminary objection was raised by him that the petition has not been filed in the manner in which it is required to be filed under the Provisions of the Companies (Court) Rules, 1959. Under Rule 18 of the Companies (Court) Rules, 1959, every affidavit shall be signed by the

deponent and sworn in the manner prescribed by the Court or by the Rules and Practice of the Court, whereas in the instant case, no such affidavit has been filed and one Shri Gautam Thakkar has just verified the petition. Under Rule 21 of the aforesaid Rules, where a petition is presented by a body corporate, it shall be in Form No. 3. He has further submitted that in the opening paragraph of Form No. 3, the petitioner should mention his age, his father's name, residential address, etc. and in para 1, he must give his designation and he must be a person who is fully authorised by the petitioner Company to make the affidavit. In para 2, the deponent should state that the averments made in the petition are based on information and that he believes the same to be true. In the instant case, no such facts have been given nor any such statements to be made or are required to be made under the aforesaid Rule 18 & 21 of the Rules read with Form No. 3 have been made. Mr. Kavina has further submitted that the said Shri Gautam

Thakkar has not filed any particular or document showing his authorisation or authority to file the said Company Petition. As is apparent from the petition, the petition is purported to have been filed on behalf of the Company. The Company being a legal person, it cannot file a petition of its own physically and hence, such officer or Officers of the Company as are authorised by the shareholders of the Company in a General Meeting or by the Directors in the Board Meeting alone can file and prosecute a petition. In the instant case, the respondent Company strongly believes that no such authority has been given to said Shri Gautam Thakkar and he has taken upon himself the task of filing the petition without any authority and hence, the petition deserves to be dismissed on the ground of this preliminary objection alone.

27. Mr. Kavina has raised further preliminary objection that the present petition appears to have been filed on the ground of the respondent

Company's inability to pay the debts which are due and payable by the respondent Company to the petitioner Company. By inviting the Court's attention to the provisions contained in Section 433, 434 (1) & 439 (1) of the Act, he has submitted that there should be debts due and payable by the Company sought to be wound up and the petition should be filed by a Creditor to whom the debts are payable. None of these conditions or requirements are satisfied. The respondent Company was not in any way concerned with the transaction of Gift. There was no privity of Contract or understanding between the petitioner and the respondent Company at any point of time. The petitioner Company is not a Creditor of the respondent Company in as much as there is no debt which is payable by the respondent Company to the petitioner. Mr. Kavina has placed reliance on the provisions of Section 122 of the Transfer of Property Act. To be a valid Gift, the conditions enumerated under Section 122 of the Transfer of Property Act must

be fulfilled. One of the ingredients of the Gift is that it must be without consideration, whereas, on perusal of the Gift Deed, in consideration of the promise of Shri F.P. Gaekwad to donate Rs. 30 Lacs, the petitioner Company has covenanted to comply with the terms and conditions stipulated in the said Deed of Gift. He has further submitted that the donee has accepted the Gift on the terms and conditions contained therein and has covenanted to comply with the said terms and conditions. He has, therefore, submitted that the basis of the debt, namely, the existence and validity of the Gift itself is at doubt.

28. He has further submitted that even if the petitioner Company is considered to be a Creditor and the respondent Company is considered to be a debtor, this Court is not the proper forum wherein money claims can be made in the guise of winding up petitions. The very act of the petitioner Company in surreptitiously

obtaining an ad-interim order against disposal of the respondent Company's property, namely, Baroda Rayon Shares, itself will show that the intention of the petitioner Company is to use the Company Petition as a leverage to use coercive force and bring pressure against the respondent Company in obtaining moneys which the respondent Company does not owe to the petitioner Company.

29. Mr. Kavina has further submitted that the claim of the petitioner Company itself is time barred in as much as the winding up petitions were filed after about 12 years from the date of execution of the Gift Deed, as in Clause 1(i) of the Gift Deed, the intention of the Donor has been mentioned or disclosed in unequivocal terms, that the properties in pursuance of the Gift Deed have been transferred to the donee. The Gift was made and was understood to take effect from the same date on which it was executed, namely, 30.03.1973. He has further

submitted that the properties stood transferred on the date on which the Gift Deed was executed. Mr. Kavina has relied on the provisions contained in Section 8 of the Transfer of Property Act wherein the provisions relating to operation of transfer are mentioned i.e. Unless a different intention is expressed or necessarily implied, the transfer of property passes forthwith to the transferee with all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. Thus, the legal position is very clear and shows that the transfer under the Gift Deed took place on 30.03.1973.

30. Mr. Kavina has further submitted that under the Limitation Act, a suit can be filed to enforce such claim within a period of three years. Under Article 137 of the Schedule to the Limitation Act, 1963, which will be applicable for filing a Company Petition also, the period of limitation prescribed is three years and the time from

which the period begins to run is prescribed as the point of time when the right to apply accrues. The petitioner has not taken any steps to enforce its claims alleged to have flown from the said Gift Deed against the Donor at any point of time. No suit has been filed against the Donor within the period of limitation prescribed under the Limitation Act. Once the period of limitation has expired, the right to sue or apply on the basis of the subject matter of the claim comes to an end automatically. Hence, the winding up petition filed by the petitioner deserve to be dismissed as it is based on a time barred claim which claim cannot be entertained even by a Civil Court in exercise of its civil jurisdiction.

31. Mr. Kavina has further submitted that the alleged acknowledgment of debts is no acknowledgment in the eye of law. For this purpose, he relied on the provisions contained in Section 18 of the Limitation Act which deals

with the effect of acknowledgment. As per Section 18, the acknowledgment should be made before the expiration of the prescribed period for a suit or application in respect of any property or right, it must be acknowledgment of liability in respect of such property or right and it must be signed by the party against whom such property or right is claimed. On fulfillment of all the conditions, a valid acknowledgment comes into effect which has got the effect of creating a fresh period of limitation. The alleged acknowledgment is devoid of any effect and is a nullity in the eye of law as it is not made before the expiration of the prescribed period for a suit or application in respect of the alleged Gift Property. The Gift Deed was executed on 30.03.1973 and no acknowledgment has been made before 30.03.1976 by the donee and no suit has been filed for enforcement of the claim under the deed of Gift before that date. The petitioner Company is not justified in relying

upon the acknowledgment made on the balance-sheet of the Company from 1978 which is two years after the expiry of the period of limitation prescribed under the Limitation Act.

32. Mr. Kavina has further submitted that the alleged acknowledgment is a nullity and is of no consequence inasmuch as it was not made bonafide by the respondent Company. There is no dispute about the fact that the Balance-sheet and profit and loss account have been prepared while the said Shri S.K. Thakkar and Shri G.K. Thakkar were Directors of the respondent Company and they were also the Directors and dominant Shareholders of the petitioner Company at the relevant time. They have abused their position as Directors of the respondent Company and had created a situation by inducing the Auditors of the respondent Company to show certain amounts in the current liabilities column of the Balance Sheet, as being the amount payable to the petitioner Company. An acknowledgment to be a

valid acknowledgment must be made with a bonafide intention by a party who is legally liable to satisfy the claim of certain persons. The alleged acknowledgment has been made on the inducement of the said Thakkar brothers and the annual accounts through which the acknowledgment is alleged to have been made were never placed before the body of Shareholders in the Annual General Meeting. The said Thakkar Brothers were completely in charge of the entire operation of the Company and the Annual Accounts were filed before the Registrar of Companies only with a view to satisfy the letter of the Companies Act and not the spirit thereof. The entries shown in the liabilities column did not amount to acknowledgment addressed to the petitioner Company and on construction of the entries, it may at the most amount to acknowledgment addressed to Shri F.P. Gaekwad.

33. Mr. Kavina has further submitted that there is a bonafide dispute as to the existence of the

debts, as to the status of the petitioner Company, namely, whether it is a Creditor or not, and as to whether the liability is enforceable or barred by limitation, and as to whether the Gift is a valid one or not, and as to whose liability it is to pay the petitioner Company, and whether the so-called acknowledgment is a genuine one or not, and as to the competence of the petitioner Company to file the petition. All these disputes raised by the respondent Company are bonafide and this Court should reject the petition without going into the controversy in deciding the disputes in question like an ordinary Civil Court.

34. In support of his submission that the petition is time barred, Mr. Kavina has relied on the decision of the Calcutta High Court in the case of **Standard Brands Ltd., In re, [1980] 50 Company Cases 75** wherein it is held that the sanction under Section 439(5) was obtained on January 8, 1973 and the winding up petition was

presented on February 27, 1978, more than five years from the date of obtaining the sanction. Under Section 137 of the Limitation Act, 1963, the petition should have been presented within three years of the date of obtaining the sanction and the petition was, therefore, barred by limitation and had to be dismissed.

35. Mr. Kavina has further relied on the decision of the Hon'ble Supreme Court in the case of **The Kerala State Electricity Board, Trivandrum V/s. T. P. Kunhaliumma, AIR 1977 SUPREME COURT 282** wherein the petition was filed before the District Judge under Section 16(3) of the Telegraph Act claiming enhanced compensation beyond 3 years from the date of service of notice intimating fixing of compensation by the State Electricity Board, and the Hon'ble Supreme Court has held that the petition was to the District Judge as a Court. The petition was one contemplated by the Telegraph Act for judicial decision and the petition was an application

falling within the scope of Art. 137 and therefore petition was barred by time.

36. In support of his submission that when the claim is barred by limitation, the Court is not required to adjudicate on the merits of the claim, Mr. Kavina has relied on the decision of the Madras High Court in the case of **Vijayalakshmi Art Productions V/s. Vijaya Productions Pvt. Ltd., [1997] 88 Company Cases 353** wherein it is held that it is the duty of the Court to dismiss the claim made beyond the prescribed period of limitation, as provided in Section 3 of the Limitation Act. If on the basis of the case set up, and the documents relied upon by the petitioner, the claim is barred in whole or in part, to the extent such claim is barred by time, the Court is not required to adjudicate on the merits of the same.

37. Mr. Kavina has further relied on the decision of

Calcutta High Court in the case of **Raghunath And Son Private Limited V/s. Pandam Tea Company Limited, [1978] 48 Company Cases 577** wherein in an application for winding up by a Creditor of a Company, though the Balance-sheet of a Company contained an entry “Secured loans as per Schedule 'A' – Rs.9,34,545” including the due to the Creditor, the report of the Board of Directors contained a statement that the liability to the Creditors was barred by limitation and hence was not confirmed by the Directors, the Court has held that there was a bonafide dispute regarding the question of limitation in respect of the claim of the Creditor and hence, the petition was dismissed.

38. Mr. Kavina has further relied on the decision of Andhra Pradesh High Court in the case of **Poddar Projects Ltd. V/s. Krishna Metal Industries Pvt. Ltd., [1996] 86 Company Cases 360** wherein while dismissing the petition, the Court has held that the plea of the respondent Company that the debt

was barred by limitation under Section 15 of the Limitation Act was a substantial defence and it could not be said that the defence was not bonafide. Therefore, the petitioner could not seek winding up of the respondent Company.

39. Mr. Kavina has further relied on the decision of the Himachal Pradesh High Court in the case of **Mazboot Packers and Engineers Company V/s. Himachal Pradesh Horticulture Produce Marketing and Processing Corporation Limited, [1999] 95 Company Cases 579** wherein, after observing that the petition had been filed on November 3, 1997 after the expiry of a period of more than six years from the date of refusal by the respondent Company to refund the amount of security, the Court held that the claim of the petitioner Company, therefore, on the face of it had become barred by time as on the date of presentation of the petition. Therefore, there was no legally recoverable debt within the meaning of Section 433 (e) of the Act.

40. Mr. Kavina has further relied on the decision of the Madras High Court in the case of **Indian Industrial Enterprises V/s. Best and Crompton Engineering Limited, [2003] 4 Company Law Journal 115 (Madras)** wherein debt alleged to be in respect of transaction said to have taken place in 1991, the petitioner has not taken appropriate steps in time for claiming amount due. There was no acceptable explanation for not taking such appropriate steps for last about 9 years. The petition was dismissed by the Court on the ground that it was barred by delay and laches.

41. Mr. Kavina has further relied on the decision of Delhi High Court in the case of **Kalra Iron Stores V/s. Faridabad Fabricators P. Ltd., [1992] 73 Company Cases 337** for the proposition that the Company's plea that the Managing Director of the Company had taken away the Company's cheque book and rubber stamp, and had

issued the cheques, was one of substance and the same should be taken into consideration while considering the winding up petition against the respondent Company.

42. Mr. Kavina has further relied on the decision of Madras High Court in the case of **N. Ethirajulu Naidu V/s. K.R. Chinnikrishnan Chettiar, AIR 1975 Madras 333** wherein the Court has held that the distinction between an acknowledgment under Section 18 of the Limitation Act, 1963 and a promise within the meaning of Section 25 (3) of the Contract Act is of great importance. Both have the effect of creating a fresh starting point of limitation, if they are in writing signed by the party or his authorised agent. But while an acknowledgment under the Limitation Act in order to be valid, must be made before the expiry of the period of limitation, a promise under Section 25, Sub-section (3) of the Contract Act, to pay a debt may be made after the debt has become barred by limitation.

43. After having heard learned advocates appearing for the respective parties and after having gone through their respective pleadings and the documents produced on record by them and after having considered the relevant statutory provisions contained under the Transfer of Property Act, Indian Limitation Act and the Companies Act, 1956, as well as the authorities cited before the Court by the learned advocates appearing for both the sides, the Court is of the view that the respondent Company has raised several points in its defence which cannot easily be discarded and that too in winding up petitions filed under Section 433 read with Section 434 of the Companies Act, 1956. Even if the Court may not accept all these defences as genuine and bonafide defences, some of the issues are, however, such which may prevent the Court to exercise its jurisdiction under Section 433 read with Section 434 of the Companies Act, 1956 for winding up of the respondent Company.

It is true that earlier during the course of admission hearing of all these petitions, the Court in its order dated 17.06.1998 has observed that when the respondent Company was not disputing its liability and it has asserted its solvency, what was the hitch in discharging this liability within reasonable time and the matter was got adjourned on the ground that the decision as to whether the respondent Company was willing to discharge the same to the petitioners or to those who were the ultimate beneficiaries could be taken by the Board in a duly convened meeting for that purpose, which meeting was never convened and no decision was taken. Thereafter, all these petitions were admitted on 01.07.2003 and pursuant to the order of admission and advertisement, necessary advertisements were effected in the Newspapers. However, this Court, is not having the benefit of the reasoning which was weighted with the Court at the time of admission of all these petitions. The Court is also aware about the

fact that appeals filed by the respondent Company against the order of admission and advertisement are still pending before the Division Bench of this Court. In this background of the matter, when the Court is called upon to decide the winding up petitions filed against the respondent Company finally, the Court will have to decide on the basis of pleadings made, materials produced and contentions raised and arguments canvassed before the Court.

44. The starting point of the petitioners' claim against the respondent Company is the Deed of Gift executed on 30.03.1973 between Late Shri Fatesinghrao Gaekwad on the one hand and the petitioner Companies on the other hand. The said Shri Gaekwad has gifted all his right, title and interest in the sum of Rs. 30 Lacs out of the sum of Rs.1,25,00,000/- lying to his credit in his account with the firm of M/s. Gaekwad Real Estate Traders. However, the said

Gift was onerous gift and it was not without consideration. The consideration was that the petitioner Company was liable to pay for the period of five accounting years from 01.04.1973 an amount equal to the entire annual net income accruing or arising from or by virtue of the said properties of Rs. 30 Lacs to Sir Sayajirao Gaekwad Charities, subject, however, to a maximum of Rs.2,10,000/- p.a. and for a further period of 50 Accounting years thereafter a sum of Rs.1,80,000/- every year to the said Trust and when the net annual income accruing or arising from or by virtue of the said properties of Rs.30 Lacs exceeds Rs.1,80,000/-, a further sum equal to such excess upto Rs.30,000/- be paid by the petitioner Companies to the said Trust. From this covenant in the Gift Deed, it appears that there is a force in the argument canvassed on behalf of the respondent Company that the amount claimed in the petition is not in the nature of a debt due and payable by the respondent Company to the petitioner and that,

to be a valid Gift, the conditions enumerated under Section 122 of the Transfer of Property Act must be fulfilled. As discussed earlier, as per the provision of Section 122, one of the ingredients of the Gift is that it must be without consideration, whereas, at the time of executing the Gift Deed, the petitioner Company has covenanted to comply with the terms and conditions stipulated in the said Deed of Gift. If ultimately it is held that the Gift is not valid one, all subsequent transactions based thereon would also be held as invalid and in that case, the petitioner could not make its claim against the respondent Company by canvassing an argument that the respondent Company is indebted to the petitioner. Even otherwise, the petitioner is under an obligation to pass on the amount received from the respondent Company to the Charitable Trust. Neither the petitioner Company nor the Charitable Trust, the beneficiary, may be entitled to claim the entire amount at a stretch

as income accruing from the said gifted properties is required to be paid annually over the period of 55 years. In this background of the matter, the petitioner's claim does not seem to be on sound footing which inspires the Court to pass the winding up order against the respondent Company.

45. Apart from this, certain preliminary objections were raised by the respondent Company. The petitioner has not filed the petition in a manner required under the provisions contained in Companies (Court) Rules. The petitions are not supported by proper affidavits and the authority of the persons who have signed the petitions was also not disclosed. The Court, however, is not inclined to rest its decision on these technical issues. What is weighed with the Court is the issue regarding limitation raised by the respondent Company. All these petitions are filed in the year 1985. The Gift was taken place on 30.03.1973. Between 1973 to

1978, the firm was in existence wherein the respondent Company was also one of the Partners. During this period, the petitioners have never lodged their claim even with regard to the amount to be annually paid to them so as to enable them to discharge their obligations towards the Charitable Trusts. There is nothing on record to show that the Firm has accepted its liabilities till 1978, barring stray instances of few payments made to the petitioners. The Deed of Dissolution executed on 31.03.1978 does contain a reference that the respondent Company has taken over all the assets and liabilities of the firm i.e. M/s. Gaekwad Real Estate Traders as on 31.03.1978. However, there are no details whatsoever from the record of this proceeding as to which assets and liabilities were taken over by the respondent Company. It is true that in the Balance-sheet of the respondent Company as on 31.03.1983, there is a reference under the “current liabilities and provisions” of amount payable under the Gift Deed executed by Shri

F.P. Gaekwad to the petitioner Company to the extent of Rs.25,87,729/-. During the course of hearing, balance-sheet as on 31.03.1979 is also produced on record wherein similar reference is there under the heading “current liabilities and provisions” which shows that amount payable under the Gift Deed executed by Shri F.P. Gaekwad to the petitioner Company is to the tune of Rs.27,16,100/-. If this is considered to be an acknowledgment within the meaning of Section 18 of the Indian Limitation Act, the question would immediately arise as to whether such an acknowledgment is a valid acknowledgment and as to whether such acknowledgment is made before the expiration of the prescribed period. This is a very substantial issue raised by the respondent Company and it cannot be straightway answered in absence of the relevant documentary evidence on record.

46. One more pertinent issue which is closely connected with the issue of limitation is as to

whether the acknowledgment shown in the Books of Accounts of the respondent Company is bonafide acknowledgment as Thakker brothers who are in the Management of the petitioner Companies are also in the Management of the respondent Company till 1985. When they were in the helm of affairs of the respondent Company, they have not thought it fit to discharge the obligation of the respondent Company and the proceedings were initiated only after they ceased to be the Directors of the respondent Company. The Court, therefore, found much substance in the submissions canvassed on behalf of the respondent Company that the acknowledgment shown in the Books of accounts of the respondent Company is not genuine and bonafide acknowledgment. The petitioner cannot base its claim on the basis of alleged acknowledgment in absence of any other corroborative evidence to this defect. Mr. P.C. Kavina, learned advocate appearing for the respondent Company has cited various authorities on many sheds and facets of

an issue regarding limitation and successfully demonstrated before the Court that if the respondent Company is in a position to satisfy that either the petition is barred by limitation or the claim made in the petition is barred by limitation or the petition suffers by delay and latches or that there is no valid, genuine or bonafide acknowledgment or that the dispute about limitation is a substantive dispute, the Court would normally not pass winding up order. The cumulative effect of all these arguments and the decisions cited before the Court prevent the Court from passing winding up order in all these petitions.

47. There is one more reason which is weighed with the Court is that the ultimate beneficiary, namely, Charitable Trust has filed Civil Suit in the Court of Civil Judge (S.D.), Vadodara against the petitioner as well as respondent Company praying for an injunction restraining the respondent Company from making any payment

to the petitioner herein. The petitioner has filed this petition against the respondent Company only with a view to enable it to discharge its obligation towards the Charitable Trust. All these issues which are raised by either of the parties in the present petition will necessarily be raised in the pending suit before the Civil Court. In such a situation, this Court does not think it fit and proper to adjudicate all these issues in the present petition and seal the fate of either of the parties before the Civil Court in the pending suit, by expressing opinion either one way or the other. Even on this ground also, the Court restrains itself from passing winding up order in the matter.

48. One more submission which was crept in during the course of argument is that the properties of the respondent Company have been disposed of time and again and the petitioner was paid only some meagre amount and the rest of the amount

was taken by Late Shri Gaekwad. If this is the case of the petitioner, in that case, the properties were disposed of during the tenure of Thakker Brothers when they were in charge of the affairs of the respondent Company and they might have allowed Late Shri Gaekwad to take the amount instead of paying the said amount to the petitioner. The respondent Company, therefore, cannot subsequently be asked to pay the said amount to the petitioner. Even otherwise, it has come on record that the petitioner and respondent Companies both were formed by late Shri Gaekwad. The amount is donated by Late Shri Gaekwad by virtue of which the petitioner became the Creditor of the respondent Company. The sole intention of Late Shri Gaekwad was to make charity and for that purpose, this devices was adopted. If the corporate veil is lifted in both the cases, namely, in the case of the petitioner as well as respondent, then only Late Shri Gaekwad may be found and he might be the Creditor as well as the debtor depending upon

the fact situation. This is also one of the factors which cannot be ignored and, therefore, it is not just and proper to pass the winding up order in the matter.

49. The Court, therefore, is of the view that there are several bonafide disputes as to the existence of debt, the status of both the Companies, the liability to be enforced by the petitioner against the respondent Company, the validity of Gift, the so-called acknowledgment whether it is valid or not and the role played by Thakker brothers till 1985 in both the Companies. Considering all these disputes to be genuine and bonafide and not merely eyewash or moonshine, the Court does not think it fit and proper to pass the winding up order in all these petitions and accordingly, all these petitions are dismissed.

50. Since the petitions are dismissed, Company Applications which are filed in all these

petitions do not survive and they are accordingly disposed of.

[K.A. PUJ, J.]

51. After the above order and judgment is pronounced, Mr. P.C. Kavina, learned advocate appearing for the respondent Company has submitted that the respondent Company has moved Company Application No. 58 of 1996 which is also disposed off today alongwith other applications by observing that since the petitions have been dismissed, Company Applications could not survive. He has further submitted that in Company Application No. 58 of 1996, the respondent Company has prayed for the direction to produce the books of account and other records, papers, files, vouchers, the Common Seal of Alaukik Trading & Investment Pvt. Ltd., and other documents and particulars etc. belonging to the applicant Company lying in the possession or control of the petitioner. The

said fact has also been admitted by the petitioner in the affidavit of Shri Gautam Thakker filed in Company Petition No. 153 of 1985 on 04.04.1986, wherein in para 26 of the said affidavit, it has been stated that in these circumstances, the petitioner Company had no other alternative but to apply to this Court by way of Company Application being Company Application No. 5 of 1986 for directions that the Official Liquidator to take charge of the books of accounts and records from the petitioner Company.

52. Since the Company petition has been dismissed, there is no question of issuing direction to the Official Liquidator to take charge of the books of accounts of the respondent Company which are in possession of the petitioner. Now, the Books of accounts and other records which are lying with the petitioner are required to be handed over to the respondent Company and accordingly, the petitioner Company is hereby directed to

hand over the said books of accounts and other records of the respondent Company to the respondent Company.

53. Subject to the aforesaid clarification, this Company Application is accordingly disposed off.

[K.A. PUJ, J.]

Savariya